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# **PRELIMINARY DRAFT**

## **No. 3203**

**PREPARED BY**  
**LEGISLATIVE SERVICES AGENCY**  
**2013 GENERAL ASSEMBLY**

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### **DIGEST**

**Citations Affected:** IC 30-4-3-35.

**Synopsis:** Matrimonial trusts. Specifies the factors to consider when determining whether the surviving settlor's interest in the matrimonial property will be exposed to the claims of the surviving settlor's existing creditors or new creditors after the death of a settlor of a matrimonial trust.

**Effective:** July 1, 2013.



A BILL FOR AN ACT to amend the Indiana Code concerning trusts and fiduciaries.

*Be it enacted by the General Assembly of the State of Indiana:*

1       SECTION 1. IC 30-4-3-35, AS AMENDED BY P.L.36-2011,  
2       SECTION 9, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE  
3       JULY 1, 2013]: Sec. 35. (a) This section is intended to ensure that if  
4       real property is transferred to one (1) or more revocable trusts created  
5       by a husband and wife for estate planning purposes, the husband and  
6       wife will ~~enjoy the~~ **maintain** real estate ownership protections ~~that~~  
7       **equivalent to those** they would ~~otherwise enjoy have~~ if they owned  
8       that real property in an estate by the entirety including an estate by  
9       the entirety created under IC 32-17-3-1.

10       (b) As used in this section, "joint matrimonial trust" means a single  
11       inter vivos trust established under this section by settlors who are  
12       related as husband and wife.

13       (c) As used in this section, "matrimonial property" means real  
14       property that:

15           (1) is subject to a written election to treat the property as  
16           matrimonial property under this section; and

17           (2) is owned by a matrimonial trust.

18       (d) As used in this section, "matrimonial trust" means a trust  
19       established under this section to own matrimonial property.

20       (e) As used in this section, "separate matrimonial trust" means a  
21       separate trust that is also a matrimonial trust.

22       (f) As used in this section, "separate trust" means a trust established  
23       by one (1) individual.

24       (g) A matrimonial trust may be established:

25           (1) jointly by a husband and wife; or

26           (2) in two (2) or more separate trusts.

27       (h) A husband and wife may elect to treat real property as  
28       matrimonial property with a written statement of the election:

29           (1) in an instrument or instruments conveying the real property to  
30           a matrimonial trust or trusts; or

31           (2) in a separate writing that must be recorded in the county



where the real property is situated and indexed in the records of the county recorder's office to the instrument or instruments that convey the real property to a matrimonial trust or trusts.

(i) A guardian of a husband or wife may make an election under this section:

(1) without the approval of the court if the guardian has unlimited powers under IC 29-3-8-4; and

(2) with the approval of the court in all other cases.

(j) An attorney in fact of a husband and wife may join in the making of an election under this section under the powers conferred upon the attorney in fact by IC 30-5-5-2 if the power of attorney is recorded in the county where the real property is situated and indexed in the records of the county recorder's office to the instrument or instruments that convey the real property to a matrimonial trust or trusts.

(k) The terms of a separate matrimonial trust or a joint matrimonial trust may (but are not required to) restrict the sale or transfer of the matrimonial property for:

(1) the lifetime of the settlor who dies first;

(2) the lifetime of the surviving settlor; or

(3) another defined time period.

(l) An interest in matrimonial property is not severable during the marriage of the husband and wife unless:

(1) both the husband and wife join in the severance in writing; or

(2) a third party owns and forecloses a mortgage or other lien against the interests of both the husband and wife in the matrimonial property.

(m) Notwithstanding any other provision of this section, the legal rights of a lienholder that exist at the time of an election to treat the real property subject to the lien as matrimonial property may not be subject to a severance described in subsection (l) without the lienholder's written consent.

(n) To the extent that a matrimonial trust continues to be a matrimonial trust after the death of a settlor (as provided by subsections ~~(p)~~ (p) and ~~(r)~~ (r));

(1) real property held or owned in a separate trust and for which an earlier election was made under this section continues to be matrimonial property; and

(2) an unsecured creditor or judgment lien creditor who has a claim only against the deceased settlor but not against the surviving settlor cannot enforce that claim against the deceased settlor's interest or the surviving settlor's interest in the matrimonial property.

**(o) After the death of a settlor of a matrimonial trust (whether separate or joint), the issue of whether the surviving settlor's interest in the matrimonial property will be exposed to the claims of the surviving settlor's existing creditors or new creditors must**



1 **be determined according to:**

2 **(1) the nature and extent of the surviving settlor's interest in**  
 3 **the matrimonial property under the terms of the deceased**  
 4 **settlor's separate trust or the joint trust;**

5 **(2) all other relevant facts and circumstances; and**

6 **(3) pertinent principals of non-trust law outside this article.**

7 ~~(p)~~ **(p)** Matrimonial property held in a separate matrimonial trust or  
 8 in a joint matrimonial trust continues to be matrimonial property after  
 9 the death of one (1) settlor:

10 (1) if the settlors reserved a life estate in the matrimonial property  
 11 for each settlor when they conveyed the matrimonial property to  
 12 the matrimonial trust or trusts; or

13 (2) if the deceased settlor's separate trust provides to the surviving  
 14 settlor:

15 (A) a life estate;

16 (B) an interest that qualifies for a deduction from the gross  
 17 estate of the decedent under Section 2056 of the Internal  
 18 Revenue Code regardless of whether an election is made to  
 19 qualify the interest for the deduction; or

20 (C) in some respect the current right to occupy or receive rent,  
 21 royalties, or other kinds of income with respect to the  
 22 matrimonial property.

23 ~~(p)~~ **(q)** A separate matrimonial trust established by a deceased  
 24 settlor ceases to be a matrimonial trust upon the termination of  
 25 payments to the surviving settlor as a result of the surviving settlor's  
 26 death or as a result of the surviving settlor's valid disclaimer of all  
 27 interests in the matrimonial property held in the deceased settlor's trust.

28 ~~(q)~~ **(r)** A separate matrimonial trust established by a settlor who  
 29 remains alive continues to be a matrimonial trust during that settlor's  
 30 remaining lifetime, so long as the settlor retains the right to use or  
 31 occupy matrimonial property held in the settlor's separate trust.

32 ~~(r)~~ **(s)** A matrimonial trust ceases to be a matrimonial trust upon the  
 33 dissolution of the marriage of the settlors.

34 ~~(s)~~ **(t)** A husband and wife may revoke a matrimonial trust by  
 35 together executing a writing expressing the revocation.

